

Practice Update

# The Ripple Effect of New York's Minimum Wage Increase - Part I: The Non-Hospitality Industry

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Companies with employees in New York may feel ripple effects of New York's upcoming minimum wage increases in ways they may not have considered, resulting in a heavier financial burden for many.

As detailed in our [HR Defense blog post](#), beginning on December 31, 2016 and over the next few years, there will be multiple different hourly minimum wages in the state, some incrementally increasing annually up to as much as \$15.00 per hour by as early as 2018. Increases to the minimum wage may simultaneously impact other wage obligations for employers.

In this two-part series, Akerman LLP assess the effect of the minimum wage increases on employers' other wage related obligations, first in the non-hospitality industry, and in our second installment, in the hospitality industry.

In industries outside of hospitality, the N.Y.S. Department of Labor has issued regulations that subject employers to various wage obligations aside from the minimum wage requirement, which may be directly or indirectly affected by the increases to the minimum wage. As a result, employers will not only have to face and prepare for the increases to the minimum wage, but they may also have to address

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in some form the effect those increases will have on other wage related obligations under the labor department's regulations, including: (a) tip credits; (b) call-in pay; (c) spread of hours and split shift pay; and (d) uniform allowances.

### **Tip Credits**

Generally, tips may be incorporated and considered a part of the minimum wage if (i) the particular non-hospitality occupation in which the employee is engaged is one in which tips have customarily and usually constituted a part of the employee's remuneration; (ii) substantial evidence is provided that the employee received in tips at least the amount of the allowance claimed, such as a statement signed by the employee that he actually received in tips the amount of the allowance claimed; and (iii) the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.

Assuming an employer meets the above requirements for applying a tip credit to the minimum wage, the tip credit an employer outside of the hospitality industry may take on an employee's wage as of December 31, 2015 is (a) \$1.35 an hour for an employee whose weekly average of tips received is between \$1.35 and \$2.20 per hour, and (b) \$2.20 an hour for an employee whose weekly average of tips received is \$2.20 per hour or more.

The labor department currently does not allow for tip credits in non-hospitality industries for an employee whose weekly average of tips is less than \$1.35 an hour. The requirement that employees have to earn at least \$1.35 an hour on average per week in tips, which does not exist for hospitality workers under the labor's regulations, may make it difficult for some employers looking for relief from the increases to the minimum wage. In other words, if an employee earns less than the minimum threshold of \$1.35 per hour in average tips, the employer

cannot use the tip credit to offset the increased minimum wage.

### **Call-in Pay**

An employee who reports for work on any day because the employee is scheduled or asked to report to work must be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage. As a result, employers will need to pay close attention to staffing needs ahead of time and communicate with scheduled employees in advance to ensure that employees do not report to work when they are not needed. If they fail to do so, they will be paying call-in pay unnecessarily.

Therefore, employers should institute a written policy requiring employees to check the work schedule the day before reporting to work, and train scheduling supervisors to notify staff by phone, email or text the day before if they are not going to be needed. The employer is only subject to having to pay call-in pay when the employee actually arrives to work.

### **Additional Rate for Split Shift and Spread of Hours**

An employee is entitled to receive one extra hour's pay at the current minimum hourly wage rate for any day in which (a) the spread of hours exceeds 10 hours; (b) there is a split shift; or (c) both situations occur. However, if an employee's hourly rate of pay exceeds the current minimum hourly rate, the excess earned above the minimum wage is credited against the extra hour of pay that is due. So employers may avoid having to pay for an extra hour if the hourly rate they otherwise pay is high enough.

A split shift is defined as a schedule of daily hours in which the working hours required or permitted are not consecutive. A meal period of one hour or less is not considered an interruption of consecutive hours for the purpose of split shift. A spread of hours is the

interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals, plus intervals off duty.

Because the spread of hours (and split shift) premium is a benefit designed for minimum wage workers, its value is eroded each hour of the day that an employee is compensated at a rate above the minimum hourly wage. For instance, if an employee is paid at a regular rate of \$10.00 an hour and works a 10-hour shift, the employee would not be entitled to an additional hour of pay at the current minimum wage rate of \$9.00 an hour because the employee accumulated \$1.00 extra above the minimum wage for each of the 10 hours worked, i.e., a total of \$10.00 additional dollars. That additional \$10.00 is \$1.00 more than the additional \$9.00 due under the current minimum wage rate, and, therefore, the employer would not have to pay the employee the extra hour. This same analysis would apply to a split shift in which the employee was paid at a rate above the minimum wage and for a total number of hours that allowed the employee to accumulate more than the equivalent of one hour's pay at the current minimum wage.

Accordingly, employers generally may be able to avoid spread of hours or split shift pay by paying its employees at an hourly rate sufficiently above the minimum wage rate so as to account for the spread of hours or split shift premium in the total compensation the employee received for that particular day.

Notably, although the spread of hours and split shift premiums are still treated as eroding compensation under the pertinent regulations, the upcoming increases to the minimum wage may result in employers having to pay this particular premium to those employees who are paid at or slightly above the new minimum wage (e.g., \$11.00 per hour beginning on December 31, 2016 for large New York City employers), even though such employees were

not eligible to receive spread of hours and split shift pay prior to the minimum wage hike. As a result, employers may find it increasingly difficult to avoid spread of hour and split shift pay going forward, as each minimum wage hike will result in an even higher floor for the hourly rate at which this benefit is extinguished.

### **Uniform Costs**

While not directly affected by the increases to minimum wage, the cost of the increases combined with the cost of uniform obligations under the regulations only compounds the economic consequences of the wage increases for employers. Under the labor department's current regulations, where an employee purchases a required uniform, the employer must reimburse the employee for the cost not later than the time of the next payment of wages. Where an employer declines to launder required uniforms for any employee, the employer also has to pay such employee, in addition to the minimum wage prescribed: (a) \$11.20 per week, if the employee works over 30 hours weekly; (b) \$8.85 per week, if the employee works between 20 to 30 hours weekly; and (c) \$5.35 per week if the employee works 20 hours or less weekly.

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